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ABSTRACT

This paper outlines the law of defamation as it pertains to those written and oral communications of reference that are commonly made by professionals in educational administration. Although this body of law varies from state to state, the basic principles are generally applicable. After an introduction, the first section defines defamation and cites litigation that has clarified and interpreted the scope of this definition. The second section defines the concepts of liability and damage in relation to defamation suits. This is followed, first, by a review of pertinent cases that have been used to define published defamation (libel) and, second, by a survey of cases that construe the scope of fault that can be attributed to publishers. The following section discusses liability with respect to the truth or falsity of statements made in publications. This is followed by a discussion of case law construing the concept of privilege, or immunity, in defamation cases. The last section defines burden of proof in defamation cases, and is followed by a summary of guidelines in determining the extent to which actions may be liable for defamation. (TE)

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GIVING A CANDID APPRAISAL OF AN APPLICANT: WHAT IS THE RISK OF LIABILITY FOR DEFAMATION?

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GIVING A CANDID APPRAISAL OF AN APPLICANT: WHAT IS THE RISK OF LIABILITY FOR DEFAMATION?

I. Introduction

Professors and practitioners in the field of education administration often write letters of reference about persons applying for initial employment, employment promotions, or admission to academic programs. Telephone conversations or personal interviews are sometimes used for these same purposes.

When one gives information or ventures an opinion about a second person's characteristics or qualifications to a third party, and the substance of that communication is less than flattering, thoughts of defamation and law suits may come to mind. Although legal actions are a possibility, such communications made in the course of one's professional work are afforded substantial protections under the law. The scope of these protections thus becomes a matter of some importance.

The purpose of this paper is to analyze the law of defamation as it pertains to those written and oral communications of reference that are commonly made by professionals in educational administration. Although this body of law varies somewhat from state to state, the basic principles are generally applicable and should serve as a useful guide for anyone professing or practicing in this field.

II. Defamation

A. The Restatement (Second) of Torts Sec. 558 (1977) sets out the elements of a cause of action for defamation:

> To create liability for defamation there must be:
>
> (a) a false and defamatory statement concerning another;
>
> (b) an unprivileged publication to a third party;
>
> (c) fault amounting at least to negligence on the part of the publisher; and
>
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

B. Defamation is made up of the twin torts of libel and slander. In general, libel is written and slander is oral. Prosser and Keeton on Torts 771 (5th Ed. 1984). See also Restatement (Second) of Torts Sec. 568 (1977). Thus, a defamatory letter of reference could be libel, and a defamatory telephone conversation could be slander.

C. Defamatory Communication Defined

"A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts Sec. 559 (1977).

D. Fact or Opinion

1. A defamatory communication may consist of a statement of fact. Restatement (Second) of Torts Sec. 565 (1977). Also, a defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable

only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion. Id. at Sec. 566.

2. The law of defamation has distinguished between the publication of defamatory statements of fact and derogatory or defamatory expressions of opinion about others. The distinction is important for several reasons. Truth has served as a defense for one who publishes defamation, and there is a distinction between statements of fact and statements of opinion in regard to what is "the truth." Also, a qualified privilege to comment on matters of public interest has generally been recognized. Finally, it may be that the First Amendment constitutional privileges will encompass all pure opinions. Prosser and Keeton on Torts 813 (5th Ed. 1984).

3. A number of state courts have taken the position that pure expressions of opinion are not actionable. See, e.g., Glaze v. Marcus, 729 P.2d 342 (Ariz. App. 1986), True v. Ladner, 513 A.2d 257 (Me. 1986), Belliveau v. Rerick, 504 A.2d 1360 (R.I. 1986). The basis for this view appears to be grounded in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), where the Court said:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judge and juries but on the competition of other ideas." Id. at 339-40.

Gertz involved a suit against a media publisher, and the wisdom of applying such a constitutional protection in that context seems clear. One might question, however, whether private communications of opinion about private persons on private matters should be afforded that same insulation.

4. Illustrations of Fact, Opinion, and Opinion Based on Fact

   a. Statement of fact: A superintendent wrote that "Last year, our six Principals and Elementary Coordinator unanimously recommended that he no longer be retained in our system as a speech correctionist. He, therefore, was not offered a contract to return this year." The court treated this as a statement of fact. Hett v. Ploetz, 121 N.W.2d 270 (Wis. 1963).

   b. Statement of opinion: A superintendent wrote that "We feel that Mr. Hett is not getting the results that we expected in this very important field. I, personally, feel that Mr. Hett does not belong in the teaching field. He has a rather odd personality, and it is rather difficult for him to gain the confidence of his fellow workers and the boys and girls with whom he works." The court treated this as a statement of opinion. Hett v. Ploetz, 121 N.W.2d 270 (Wis. 1963).

   c. Statement of opinion based on disclosed facts: A department chairman's memorandum included a negative recommendation and an opinion that an assistant professor had not met the publication criteria for promotion. The

recommendation and opinion were based on a four-page summary of research and service activities provided by the professor. The court concluded that the facts on which the chairman's opinion were based were wholly disclosed in the summary provided. Belliveau v. Rerick, 504 A.2d 1360 (R.I. 1986).

d. Statement ostensibly in the form of opinion that implied undisclosed defamatory facts: In the course of a telephone conversation, a teacher's former superintendent stated that the teacher was a good mathematician but not a good mathematics teacher, that the teacher was more concerned with living up to the terms of the contract rather than going the extra mile, and that he did not feel the teacher turned the students on. The court found that these statements, although agruably in the form of opinions, implied undisclosed defamatory facts. True v. Ladner, 513 A.2d 257 (Me. 1986).

III. Liability and Damage (Special Harm)

A. Special harm is the loss of something having economic or pecuniary value. Restatement (Second) of Torts Sec. 575, Comment b. (1977).

B. Even if no special harm results, one who falsely publishes defamatory matter in the form of libel or certain kinds of slander is subject to liability. The kinds of slander for which actual damage need not be proved include imputations of: (1) a criminal offense; (2) a loathsome disease; (3) a matter incompatible with

one's business, trade, profession, or office; or, (4) serious sexual misconduct. Actual damage must be proved for other kinds of slander. Prosser and Keeton on Torts 785-95 (5th ed. 1984); Restatement (Second) of Torts Secs. 569, 570, & 575 (1977).

IV. Publication

A. Defamation requires that something be communicated to one other than the person defamed. Prosser and Keeton on Torts 771 (5th Ed. 1984); Restatement (Second) of Torts Sec. 577(1) (1977).

B. Technically, a publication of defamation could result from the fact that an office secretary or stenographer is involved. See Nelson v. Whitten, 272 F. 135 (E.D.N.Y. 1921).

C. The law of the state where the defamatory material is published may be the law applied, which is of some consequence for those who supply references to persons in other states. See Johnson v. Educational Testing Service, 754 F.2d 20 (1st Cir. 1985), cert. denied, 105 S.Ct. 3504.

D. A Nebraska case held that a cause of action accrued on the date of publication, and the suit was barred by the one-year statute of limitations in Neb. Rev. Stat. Sec. 25-208. Lathrop v. McBride, 209 Neb. 351, 307 N.W.2d 804 (1981).

V. Fault on the Part of the Publisher

A. Several decisions by the United States Supreme Court have had a major effect on the degree of fault on the part of media publishers that a plaintiff must prove in order to recover damages.

1. New York Times v. Sullivan, 376 U.S. 254 (1964) held that the Constitution prohibits a public official from recovering for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice--that is, with knowledge that it was false or with reckless disregard for whether it was false or not.
2. Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967) extended this constitutional privilege to defamatory criticism of "public figures."
3. Gertz v. Robert Welch, 418 U.S. 323 (1974) left it to the states to decide the appropriate standard of liability for a media publisher of defamatory falsehoods injurious to a private individual, so long as they did not impose liability without fault or permit recovery of punitive damages where liability was not based on knowledge of falsity or reckless disregard for the truth.
4. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., -U.S.-, 105 S.Ct. 2939 (1985) affirmed a holding that Gertz was not applicable to a nonmedia defamation action. Although no opinion could muster a majority, it appeared that the fact that the defamation did not involve a matter of public concern was an important factor in the Court's decision.
5. Philadelphia Newspapers, Inc. v. Hepps, -U.S.-, 106 S.Ct. 1558 (1986) held that a private-figure plaintiff cannot recover damages from a media defendant without also showing that statements on a matter of public concern are false.

6. All of these decisions stand for the general proposition that the news media must be allowed some latitude for error so that freedom of expression about matters of public concern is not unnecessarily curtailed.

B. Some of the implications of these Supreme Court decisions on the law of defamation remain unclear, but the impact has been substantial. The Restatement (Second) of Torts (1977) has taken the position that liability for publishing a false and defamatory communication about a public official or figure requires a showing of either knowledge or reckless disregard, Id. at Sec. 580A, while liability for publishing a false and defamatory communication about a private person can be established by showing either knowledge, reckless disregard, or negligence. Id. at Sec. 580B.

C. In the absence of some extraordinary circumstances, an applicant for a position or program in education would be considered a private person in that context. See True v. Ladner, 513 A.2d 257 (Me. 1986); Vinson v. Linn-Mar Community School District, 360 N.W.2d 108 (Iowa 1984).

VI. True Statements

A. To create liability for defamation, there must be publication of a communication that is both defamatory and false. Prior to the decisions by the United States Supreme Court relating to the constitutional privilege to defame, the common law rule was that truth was an affirmative defense that the defendant must plead and prove; thus, a defamatory statement was presumed to be false unless

the defendant proved it to be true. Prosser and Keaton on Torts 839-42 (5th Ed. 1984).

B. The Restatement (Second) of Torts Sec. 581A (1977) provides that the publisher of a defamatory statement of fact is not subject to liability for defamation if the statement is true. Comment a. notes that in some states truth is not a defense if the statement is published for malicious motives or if not published for justifiable ends or on a matter of public concern. Comment b. sets out the common law rule that falsity must be alleged by the plaintiff, that the falsity of a defamatory statement is presumed, and that truth is an affirmative defense to be pleaded and proved by the defendant. It is further noted that there are constitutional issues to be considered regarding both comment a. and comment b.

C. Nebraska is one state with laws that may be constitutionally suspect. The state constitution provides that in all trials for libel the truth when published with good motives and for justifiable ends shall be a sufficient defense. Neb. Const. Art. I, Sec. 5. A statute provides that in trials for libel and slander truth is a complete defense unless the plaintiff can prove the publication was made with actual malice. (The Nebraska courts have construed these provisions to mean that truth is an absolute defense for slander, but not for libel.) This statute also provides that truth is an affirmative defense to be alleged and proved by the defendant. Neb. Rev. Stat. Sec. 25-840 (Reissue 1985). In view of the U.S. Supreme Court decisions discussed

above, the constitutional validity of these Nebraska laws would be doubtful in cases involving media defendants and a matter of public concern. In cases involving private defendants sued by private plaintiffs over a private matter, as would likely be the context of a defamation action arising from a communication of reference, the implications of the First Amendment protections are not entirely clear.

VII. Privilege

A. The defense of privilege, or immunity, in defamation cases rests on the idea that conduct that would otherwise be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance that is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation. Prosser and Keeton on Torts 815-16, 824-25 (5th Ed. 1984).

B. Some privileges are said to be absolute, while others are said to be qualified or conditional. Prosser and Keeton on Torts (5th Ed. 1984) lists the circumstances giving rise to each.

1. Absolute: judicial proceedings (including quasi-judicial); legislative proceedings; executive communications in government; consent of the plaintiff; husband and wife communications; and political broadcasts. Id. at 815-24.
2. Qualified: the interest of the publisher, the interest of others, a common interest, communications to one who may act in the public interest, and fair comment on matters of public

concern. (The constitutional privilege could be included, although the concept is different.) Id. 824-32.

C. Of the absolute privileges, two are most likely to arise in an educational setting, those associated with quasi-judicial proceedings and those arising from consent.

1. Quasi-judicial proceedings

a. Statements made in the course of a quasi-judicial hearing should be absolutely privileged. Webster v. Byrd, 494 So.2d 31 (Ala. 1986) (termination proceedings). The rule of absolute privilege applies not only to judicial proceedings, but to quasi-judicial proceedings as well. Kloch v. Ratcliffe, 221 Neb. 241, 375 N.W.2d 916 (1985) (arbitration proceedings).

b. Absolutely privileged communications made in the course of quasi-judicial proceedings must not be published outside of the circle of those who must have knowledge of them pursuant to the decision-making process. A recipient of such a communication made outside of the judicial or quasi-judicial proceeding must have a direct or close relationship to that proceeding or the absolute privilege is lost. Webster v. Byrd, 494 So.2d 31 (Ala. 1986). Also, the defamatory matter must be related to the proceedings. See Cummings v. Kirby, 216 Neb. 314, -N.W.2d- (1984).

2. Consent

a. As a general rule, the consent of another to the publication of defamation concerning him is a complete

defense to his action for defamation. Restatement (Second) of Torts Sec. 583 (1977). This has been interpreted to mean that it is not necessary that the other knows the matter is defamatory, but that it is enough if the other knows the exact language or has reason to know that it may be defamatory. Id. at Comment d.

b. The privilege conferred by consent is absolute. Dominguez v. Babcock, 727 P.2d 362 (Colo. 1986); Baker v. Lafayette College, 504 A.2d 247 (Pa.Super. 1986) appeal granted, 515 A.2d 898.

c. The consent privilege may arise in a number of ways. The following are illustrative.

(1) By enrolling in a post-graduate program, a student impliedly consented to intra-school publication of faculty members' statements evaluating his supervised clinical work. Kraft v. W. Alanson White Psychiatric Foundation, 498 A.2d 1145 (D.C.App. 1985).

(2) By signing his employment contract, an assistant professor agreed to the evaluation procedures set forth in the faculty handbook, which provided for annual written evaluations by the department head, and thus consented to the publication of these evaluations. Baker v. Lafayette College, 504 A.2d 247 (Pa.Super. 1986) appeal granted, 515 A.2d 898.

(3) A request for reasons for another's actions is consent

to publication of the reasons. Dominguez v. Babcock, 727 P.2d 362 (Colo. 1986).

d. Consent is a defense to an action for defamation only to the extent of that consent. In response to a request from a department chairman that faculty provides a more detailed explanation of charges they had previously made, the faculty made additional allegations that may have gone beyond the scope of the request. Dominguez v. Babcock, 727 P.2d 362 (Colo. 1986).

e. In the instance of implied consent grounded on a student's contractual relationship with a college, statements evaluating his work should be relevant to the object of the consent, and the broadcast of the communication should be limited to those with a legitimate interest in the subject matter. See Kraft v. W. Alanson White Psychiatric Foundation, 498 A.2d 1145 (D.C.App. 1985).

f. An interesting point is made in one older case. A defendant argued that the plaintiff could not complain because the communication was in response to the plaintiff's request for a letter of reference. He failed to pursuade the court, who noted that if the defendant didn't care to do so he could have refused the request and that the plaintiff had not invited the defendant to make public anything false and defamatory. Nelson v. Whitten, 272 F. 135 (E.D.N.Y. 1921).

D. In the context of communications of reference, it is the qualified privileges that are most important. Of the circumstances giving rise to a qualified privilege that were noted above, it is the furthering of either the "interest of others" or a "common interest" that will generally be applicable to such references.

1. Qualified or conditional privileges are generally grounded in the concept that there are a variety of situations in which the interest that the publisher is seeking to vindicate or further is regarded as being sufficiently important to justify some latitude in making mistakes, so that the publication of the defamation should be conditionally or qualifiedly privileged. Prosser and Keeton on Torts 824-25 (5th Ed. 1984). The condition attached to such qualified privileges is that they must be exercised in a reasonable manner and for a proper purpose. The immunity will be forfeited if the publisher exceeds the scope of the privilege or abuses the occasion. The qualified immunity does not extend to defamatory matter that is irrelevant to the interest entitled to protection, that is published to anyone other than those who it is reasonably believed need to know to further the interest, or that is published in the wrong state of mind. Id. at 832-34.

2. An excellent overview of the nature of the conditional privilege is set out in Restatement (Second) of Torts (1977).

   a. Sec. 593--Elements of Conditional Privilege Arising from Occasion provides that "One who publishes defamatory matter concerning another is not liable for the publication if (a)

the matter is published upon an occasion that makes it conditionally privileged and (b) the privilege is not abused."

b. In relation to communications of reference and occasions giving rise to a conditional privilege, see Sec. 595--Protection of Interest of Recipient or a Third Person, and Sec. 596--Common Interest.

c. Sec. 599--General Principle (Abuse of Privilege) provides that "One who publishes defamatory matter concerning another upon an occasion giving rise to a conditional privilege is subject to liability to the other if he abuses the privilege."

d. In relation to communications of reference and the abuse of the conditional privilege, see Sec. 600--Knowledge of Falsity or Reckless Disregard as to Truth, Sec. 603--Purpose of the Privilege, Sec. 604--Excessive Publication, and Sec. 605--Necessity for Publication and Purpose of Privilege.

3. Courts have tended to recognize, under either the "interest of the recipient" or the "common interest" principle, that a qualified privilege attaches to communications regarding the qualifications of applicants for employment [see True v. Ladner, 513 A.2d 257 (Me. 1986); Vinson v. Linn-Mar Community School District, 360 N.W.2d 108 (Iowa 1984); Stuempges v. Park, Davis, & Co., 297 N.W.2d 252 (Minn. 1980); Hett v. Ploetz, 121 N.W.2d 270 (Wis. 1963)], of applicants for promotion [see

Belliveau v. Rerick, 504 A.2d 1360 (R.I. 1986)], and of applicants to educational programs [see Goldman v. Wayne State University Board of Governors, 390 N.W.2d 672 (Mich. App. 1986); Johnson v. Educational Testing Service, 754 F.2d 20 (1st Cir. 1985) cert. denied 105 5.Ct. 3504]. It should be noted, however, that in some of these cases the existence of the qualified privilege is not stated specifically by the court, but can probably be inferred from the procedural posture of the case and/or the manner in which the court disposed of the issues.

a. It can also be inferred from a review of the cases that an important factor in the determination of whether a qualified privilege exists in these situations is whether the communication was in response to a request from either the interested other party or the person allegedly defamed. If not, the privilege is less likely to attach. This point is made specifically in the Restatement (Second) of Torts Sec. 595(2) (1977).

b. It is clear that a qualified privilege can be lost through abuse. Three cases are offered as examples of the criteria plaintiffs have met to overcome the privilege.

   (1) True v. Ladner, 513 A.2d 257 (Me. 1986) involved a suit by a teacher against his former superintendent for defamatory comments made in response to a request from the superintendent of the school system where the teacher was applying. The superintendent's remarks,

while arguably in the form of opinion, implied the existence of undisclosed defamatory facts; his appraisal of the teacher simply did not square with what the evidence showed about the teacher's work in his school system. The court sustained a jury finding that the former superintendent's statements were made with knowledge of their falsity or with reckless disregad of their truth or falsity.

(2) Vinson v. Linn-Mar Community School District, 360 N.W.2d 108 (Iowa 1984) involved a suit by a school bus driver against her former supervisor. He was called by an official of the school to which she was applying to find out why she had been discharged; he stated that he terminated her for recording incorrect time on time cards. The court believed that this statement could be taken as imputing dishonesty and therefore understood as defamatory per se. The evidence showed that there had been a protracted and bitter disagreement about how the time cards should be filled out, but that the driver had not actually been dishonest. The court sustained the jury finding that the plaintiff had proved the statements were made with actual malice--malice in fact, ill-will, or wrongful motive.

(3) Stuempges v. Park, Davis & Co., 297 N.W.2d 252 (Minn. 1980) involved a suit by a sales representative against a former supervisor. The two had been involved in a

dispute over how the plaintiff should do his job. The plaintiff was asked to resign and was promised a good recommendation if he did so. He resigned, but the supervisor, who had been one of those requesting his resignation, later gave a false and defamatory reference over the phone in response to a request from a placement service. The court believed that the falsity of the statements, after prior indications of favorable impressions of the plaintiff's capabilities and that a good recommendation would be given, took this case out of the realm of privilege. The court noted that it was important to protect a job seeker from malacious undercutting by a former employer. In this context, state of mind was more important than knowledge of falsity. The evidence supported a jury finding of malice, and it was reasonable for the jury to determine that the conditional privilege had been abused.

E. A conditional privilege can serve to protect one who gives an allegedly defamatory reference if the privilege is not abused. In Hett v. Ploetz, 121 N.W.2d 270 (Wis. 1963), a superintendent wrote in response to a request for his comments on a teacher's qualities. His letter included both statements of fact and statements of opinion, neither of which were complimentary. The teacher sued to recover damages to his professional reputation. The record showed that the factual portions were not contradicted and that the

expression of opinion was not founded in malice. The teacher had listed the superintendent as a reference, and the nature of their past relationship showed that the superintendent had been generally supportive. The letter was sensitive, factual, and honest. The court affirmed the summary judgment for the defendant.

VIII. The Restatement (Second) of Torts (1977) sets out the issues in a defamation suit for which the defendant or the plaintiff must bear the burden of proof.

A. Sec. 613--Burden of Proof provides as follows:

(1) In an action for defamation the plaintiff has the burden of proving, when the issue is properly raised,

(a) the defamatory nature of the communication,

(b) its publication by the defendant,

(c) its application to the plaintiff,

(d) the recipient's understanding of its defamatory meaning,

(e) the recipient's understanding of it as intended to be applied to the plaintiff,

(f) special harm resulting to the plaintiff from its publication,

(g) the defendent's negligence, reckless disregard or knowledge regarding the truth or falsity and the defamatory character of the communication, and

(h) the abuse of a conditional privilege.

(2) In an action for defamation the defendant has the burden of proving, when the issue is properly raised, the presence of the circumstances necessary for the existence of a privilege to publish the defamatory communication.

B. It may be noted that no position is taken on the placement of the burden of proof on the issue of truth or falsity. There is a

caveat following Sec. 613 about the constitutional issue regarding this point.

C. Under the traditional common-law rule, truth would be an affirmative defense for the defendant to plead and prove. Prosser and Keeton on Torts 839 (5th Ed. 1984).

IX. Conclusion

A. When one gives an appraisal of an applicant, and thoughts of liability for defamation come to mind, a number of points seem especially worthy of consideration.

1. Although the law recognizes a distinction between libel and slander, one could be held liable for an unprivileged publication of a false and defamatory statement about another whether the statement be written or oral.
2. A defamatory statement of pure opinion is, at least in theory, not actionable; however, it is not always clear what constitutes a statement of "pure" opinion. An honest opinion based on disclosed true facts should be protected. But an opinion that implies the existence of undisclosed defamatory facts may be actionable.
3. A defamatory statement of fact may be actionable. Any fact stated or implied should be true.
4. When one is asked by an applicant for permission to be listed as a reference or to provide a communication in support of his/her application, agreement to either would seem to imply that one's comments will be supportive; if the comments are not

supportive, that may be viewed as an act of bad faith. If one cannot say good things about the person, it would seem best to refuse any such request.

5. When one responds to a request for information about an applicant from another who has a need for that information, a qualified privilege will likely afford protection against liability for defamation. The qualified privilege will be lost, however, if it is abused. To avoid abuse, the communication should include only matters that are relevant, should be an honest and true statement about such matters, and should not reflect any hostility, ill-will, or improper motives.
6. If privilege is to be a defense, be prepared to prove the existence of the privilege.
7. Be prepared to prove the truth of any statement made.

B. Much more could be said about the law of defamation. The subject is extensive and complex. Some general principles and issues have been addressed. The outcome of any litigation would depend on the facts of a given situation and the laws to be applied. It is hoped that this paper will serve as a useful reference.